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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-528

AMALGAMATED LOCAL UNION 355,
BERNARD TOLKOW and HENRY STIRT,

Petitioners,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioners, Amalgamated Local Union 355, Bernard Tolkow and Henry Stirt, respecfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 12, 1971.

Opinion Below

No opinion was rendered by the Court of Appeals.

Jurisdiction

The judgment of the Court of Appeals was entered on July 12, 1971. This petition for certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Can petitioners be adjudged in civil contempt of three decrees of a United States Court of Appeals which enforced orders of the National Labor Relations Board where the alleged contemptuous conduct was not prohibited by the Court's decrees but by the Board's orders which were incorporated by reference in the Court's decrees, in violation of FRCP 65(d)?

2. Does a decree of a United States Court of Appeals enforcing an order of the National Labor Relations Board against a union by incorporating that order by reference lack the specificity required by FRCP 65(d) where the Order prohibits the union from violating sections of the National Labor Relations Act with respect to anybody, anywhere and at any time under pain of contempt?

3. Was it a deprivation of due process for the Court of Appeals to hold petitioners in civil contempt of three decrees of the Court where the decrees are ambiguous and petitioners construed them in good faith?

Statutory Provisions Involved

Federal Rules of Civil Procedure 65(d):

Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

The Statement of the Case

The Union seeks review of a judgment of the Court of Appeals for the Second Circuit holding the Union in civil contempt for violating three decrees of that Court enforcing orders of the National Labor Relations Board.

These three decrees were made in cases entitled *NLRB* v. *Salmirs Oil Co. and Amalgamated Local Union 355* (here called Salmirs), *NLRB* v. *Richmond Rambler Sales Inc. and Amalgamated Local Union 355* (here called Richmond), and *NLRB* v. *Command Lincoln-Mercury Corp. and Amalgamated Local Union 355* (here called Command).

The contempt was based on the Union's conduct in organizing Robin Ford Sales, Inc. (here called Robin) and Consolidated Petroleum Terminal, Inc. (here called Consolidated). Neither Robin nor Consolidated is connected in any fashion with Salmirs, Richmond or Command, or with each other. The Union has been held in contempt for

having engaged in unfair labor practices with respect to strangers to the decrees.

The *Salmirs* decree was entered January 6, 1964. Its injunctive provisions read as follows:

> "ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Second Circuit, that the said order of the National Labor Relations Board be enforced and that the respondents, Salmirs Oil Co. and Amalgamated Local Union 355, their officers, agents, successors and assigns, abide by and perform the directions of the Board in said order contained."

The *Salmirs* decree did not embody the Board's order; it incorporated the order by reference. The Union complied and thereafter won a Labor Board election, was duly certified and since then has been the collective bargaining agent of Salmir's employees.

The *Richmond* decree was entered January 11, 1966. It was made upon a stipulation providing for the entry of a consent decree. The stipulation provided *inter alia*:

> "9. The United States Court of Appeals for any appropriate circuit may, upon application by the Board, enter its decree enforcing the order of the Board substantially set forth in paragraph 8 hereof. The Respondents waive all defenses to the entry of the decree, including compliance with the Order of the Board, and their right to receive notice of the filing of an application for the entry of such decree, provided that the decree is substantially in the words and figures set forth in paragraph 8 hereof . . .

> 10. . . . It is understood that the signing of this stipulation by the Respondent does not constitute an admission that either has violated the Act."

However the decree as entered did not follow "the words and figures" of the proposed decree set forth in the stipulation; it merely incorporated the Board's order by reference. Again, the Union complied and thereafter won a Board supervised election and has been the collective bargaining agent of Richmond's employees since then.

The decree in *Command* was entered March 28, 1966. It, too, was entered upon a stipulation containing a non-admission clause and providing for a consent decree, as in *Richmond*. Here again as in *Richmond*, the decree as entered did not follow "the word and figures" of the proposed decree contained in the stipulation; it merely incorporated the Board's order by reference. Here too, the Union complied with the Court's decree and Board order.

On May 23, 1969, over five years after the *Salmirs* decree and over three years after the *Richmond* and *Command* decrees, the Board instituted the present contempt proceeding for the Union's conduct at Robin. In January, 1970, the Board amended its motion to add similar allegations for the Union's conduct at Consolidated.

The Board charged that the Union's conduct at Robin and Consolidated violated those portions of the three decrees which incorporate by reference the orders of the Board and, particularly, those portions which, as in the *Salmirs* decree, require the Union to cease and desist from

> "(3) In any other manner restraining or coercing employees or prospective employees of Respondent Company or any other employer in the exercise of their rights to self-organization, to form labor organizations, to join or assist United Industrial

> Workers of North America of the Seafarers International Union of North America, Atlantic, Gulf, Lake and Inland Waters District, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, . . ."

The Court of Appeals struck affirmative defenses by order of July 8, 1969, without opinion. It referred the matter to a district judge to hear and report. A hearing was held and the district judge filed his report. The Union filed exceptions. On July 12, 1971, the Court of Appeals entered its judgment of civil contempt, also without opinion. A motion to stay execution of the judgment was made on July 21, 1971 and denied on August 5, 1971, also without opinion.

The contempt judgment requires petitioners to cease giving effect to union contracts with Robin and Consolidated and to reimburse the employees involved for monies collected such as dues, etc. The judgment requires that notice of the contempt adjudication be posted at the Union's office, etc. Finally, the judgment provides that future violations of the decrees shall subject the Union to a compliance fine of $10,000 and a further fine of $1,000 for each day the violation continues; the petitioners Tolkow and Stirt are subject to a compliance fine of $2,000 and a further fine of $200 per day for each day the violation continues. In sum, the judgment subjects the union, in its daily organizing activities for all time and everywhere, to the risk of severe contempt penalties if it violates the National Labor Relations Act.

Reasons for Granting the Writ

The Underlying Decrees Violate FRCP 65(d)

The decrees improperly incorporate by reference the Board's orders. FRCP Rule 65(d) requires an injunction order to describe in reasonable detail, and not by reference to other documents, the act or acts sought to be restrained.

The rule applies to decrees of Courts of Appeals enforcing Board orders. *Regal Knitwear Co.* v. *NLRB*, 324 US 13-14, cited with approval in *Longshoremen's Association* v. *Marine Trade Association*, 289 US 64, 75.

As this Court said in the latter case (389 US at p. 75):

> ". . . Consistent with the spirit and purpose of its statutory predecessor, we have applied Rule 65(d) in reviewing a judgment enforcing an order of the National Labor Relations Board and the Courts of Appeals have applied the rule not only to prohibitory injunctions but to enforcement orders and affirmative decrees as well."

The Board's brief in opposition to the petitioners' application in this Court to stay judgment stated that "all the courts of appeals, except the Ninth Circuit" "incorporate the Board's orders by reference where, as here, they are enforced without modification."

In view of this conflict among the courts of appeals, and the disregard of the clear language of FRCP Rule 65(d) here, this Court should grant certiorari to settle the law on the subject.

The Decrees Lack Specificity

The Court below has held that the three decrees are catchall injunctions which forbid the Union from violating the National Labor Relations Act with anybody at any time under pain of contempt. The Union is a labor organization. Its daily activities consist of organizing and representing employees and of bargaining collectively with employers on behalf of their employees.

The interpretation placed on these three decrees puts the Union forever in a different class from other unions. This interpretation exposes the daily activities of the Union forever to the peril of severe contempt penalties as the result of an organizer's error with regard to the status of a borderline supervisor or the excessive zeal of a Union agent or an angry employer's intemperate remarks or a foreman's predilections, etc.

Decrees so vague and so broad in scope as to subject the Union for all time to the peril of contempt proceedings for organizational activities anywhere deny due process. *Schine Theatres* v. *U. S.*, 334 US 110; *Mays Dept. Stores Co.* v. *NLRB*, 326 US 376; *Hartford Empire Co.* v. *U. S.*, 323 US 386, 409-410; *NLRB* v. *Express Publishing Co.*, 312 US 426, 435-436; *U. S.* v. *Vitasafe Corp.*, 345 F 2d 864, 871.

It Was a Deprivation of Due Process to Hold the Union in Contempt Since the Decrees Were Ambiguous and the Union Construed them in Good Faith.

These three decrees restrain the Union from violating the Labor Act with respect to the "employees of Respondent Company or any other employer." The Board con-

tends that these are blanket injunctions. The Union contends that the phrase "or any other employer" refers to other employers connected or affiliated with respondent employer.

The Board's conduct up to these contempt proceedings confirmed the Union's understanding of these decrees. After the *Salmirs* decree, the Board brought unfair labor practice proceedings, not contempt proceedings, in the *Richmond* case and then again in the *Command* case. The Board never told the Union that it was subject to contempt proceedings in these cases or that the Board *elected* to proceed by way of unfair labor practice, rather than contempt proceedings.

An injunction order is "construed and applied, as judgments must be, by the record of the proceedings out of which it issued". *Nassif* v. *U. S.*, 165 F 2d 119, 122, and cases cited therein at footnote 9. The *Salmirs, Richmond* and *Command* cases each involved the employees of a single employer. There was no basis established in those cases for a catchall injunction assuming that so broad an injunction be valid.

The Board has argued that its decision in the *Salmirs* case contains a finding with respect to other employers. However, the Board itself construed the *Salmirs* decision to be applicable only to Salmirs and employers connected with Salmirs when it proceeded by way of unfair labor practice proceedings, not contempt proceedings, in the *Richmond* and *Command* cases.

The *Richmond* and *Command* stipulations contain nonadmission clauses. They certainly would not justify or justify a catchall injunction, by the Board's own decisions. *Teamsters, etc. Local 327,* 160 NLRB 1919, 1920.

FRCP Rule 65(d) provides that an injunction order "is binding only upon the parties to the action . . . and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise", not the world at large.

Finally, it is a familiar rule of construction that where general words follow specific words, the meaning of the general words is construed as restricted by the specific words. The general words are deemed to have been used, not in the broad sense which they might bear if standing alone, but as limited by the words of specific meaning with which they are associated.

As this Court said in *Regal Knitwear Co.* v. *NLRB,* 324 US 9, 15:

> ". . . Enforcement orders are issued to effectuate the purposes of the Act, not for the entrapment of parties, and courts no less than parties desire to avoid unwitting contempts as well as to punish deliberate ones."

See also *NLRB* v. *Teamsters etc.,* 419 F 2d 1282, 1283; *Corica* v. *Ragen,* 140 F. 2d 496.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,

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October 7, 1971

APPENDIX

Judgment in Civil Contempt

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 28,451, 30,236, 30,405

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

AMALGAMATED LOCAL UNION 355,

Respondent.

This cause came on to be heard upon the petition of the National Labor Relations Board to adjudge Amalgamated Local Union 355 and Bernard Tolkow and Henry Stirt and another in civil contempt for failing to comply with three decrees of this Court, to wit, the decrees of January 6, 1964, January 11, 1966 and March 28, 1966 in Nos. 28,451, 30,236 and 30,405, respectively; and Honorable John F. Dooling, Jr., United States District Judge for the Eastern District of New York, having issued his report as Special Master, and the Court having considered and approved said report in all respects; and being fully advised in the premises, it is hereby

Judgment in Civil Contempt

ORDERED AND ADJUDGED that Amalgamated Local Union 355, Bernard Tolkow, its principle Executive Officer, and Henry Stirt, formerly its Secretary-Treasurer and now its Treasurer and Business Agent, are, and each of them is, in civil contempt for having violated the Court's decrees entered against Amalgamated Local Union 355 on January 6, 1966, January 11, 1966 and March 28, 1966, and

IT IS FURTHER ORDERED that Local 355, Bernard Tolkow and Henry Stirt shall purge themselves by:

A. Fully complying with the decrees of this Court issued against Amalgamated Local Union 355 in Nos. 28,-451, 30,236 and 30,405 dated January 6, 1964, January 11, 1966 and March 28, 1966, respectively.

B. Forthwith ceasing and desisting from:

1. Giving effect to or performing or maintaining or enforcing in any respect, the contract between Local 355 and Robin Ford Sales, Inc. dated on or about August 29, 1968, or any modification, extension or renewal thereof or any superseding agreement thereto.

2. Giving effect to or performing, or maintaining or enforcing the contract between Local 355 and Consolidated Petroleum Terminal, Inc. dated on or about February 8, 1968, or any modification, extension or renewal thereof or any superseding agreement thereto.

3. Acting as collective bargaining agent for any employees of either Robin Ford Sales, Inc. or Consolidated Petroleum Terminal, Inc., or any successor of either, unless and until Local 355 is certified by the Board as the majority representative of such employees.

4. Causing or attempting to cause any employer to discriminate against any employees in regard to their hire or tenure of employment, or any other term or condition of employment in violation of Section 8(a)(3) of the National Labor Relations Act, as amended.

5. In any manner restraining or coercing employees or prospective employees of any employer in the exercise of their rights to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by a lawful agreement lawfully requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

C. 1. Forthwith reimbursing all present and former employees of Consolidated Petroleum Terminal, Inc. who were not members of Local 355 in good standing at the time of their hire, for all initiation fees, dues, assessments and other monies collected from said employees as a condition of employment under the agreement of February 1968, between Local 355 and Consolidated, or any modification, extension or renewal thereof.

2. Preserving and upon request making available to the Board and its agents, for examination and copying, all records necessary or helpful to ascertain what is owed to employees under this order.

D. Immediately posting in conspicuous places in Local 355's business offices, meeting halls, and all places where notices to employees are customarily posted, for a period of 60 days, copies of this contempt adjudication and of the Notice appended hereto, signed by an appropriate officer of Local 355 and by Bernard Tolkow and Henry Stirt individually, and maintaining such materials in clearly legible condition throughout such posting period, insuring that such notices are not altered, defaced or covered by any other material.

E. Signing and mailing sufficient copies of said Notice to the Regional Director for the 29th Region for posting by Robin Ford and Consolidated Petroleum if said employers are willing.

F. Immediately signing and mailing copies of said Notice to all employers with whom Local 355 has a signed agreement.

G. Immediately signing and mailing copies of said Notice to all members of the respondent Union.

H. Filing a sworn statement with the Clerk of this Court and a copy thereof with the Regional Director of the 29th Region within ten days after the entry of this order and again upon termination of the posting period, showing what steps have been taken by Local 355, Tolkow and Stirt to comply with the Court's directions.

I. Paying to the National Labor Relations Board, as costs, reasonable counsel fees and all costs and expenditures incurred in the investigation, preparation, presentation and final disposition of these proceedings; said

amount to be fixed by further order of the Court upon submission by the Board of a verified bill of costs.

In order to insure compliance with the foregoing provisions, it is further ordered that upon failure of the respondents to purge themselves of contempt as herein provided, this Court will deal further with the matter by imposing a compliance fine of $10,000 upon the respondent Local 355 and $2000 each upon the respondents Bernard Tolkow and Henry Stirt for each future violation of the decrees of the Court and if the violation is of a continuing nature, further compliance fines of $1000 per day against Local 355 and $200 per day against Bernard Tolkow and Henry Stirt for each day that such violation continues and by such means as the Court shall determine including the issuance of attachment against any Union officer or agent responsible for such non-compliance.

PAUL D. HAYS,
WILFRED FINDING
WILLIAM J. JOHNSON

July 12, 1971

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v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. In July, 1971, the court of appeals approved the report of the special master, District Judge Dooling, and held petitioners in civil contempt for violating decrees entered by the court on January 6, 1964, and January 11 and March 28, 1966 (Pet. App. 1a-2a). These decrees enforced orders of the National Labor Relations Board prohibiting petitioners from engaging in organizational activities in violation of Section 8(b)(1)(A) and (2) of the National Labor Relations

Act (29 U.S.C. 158 (b)(1)(A) and (2)), with respect not only to the particular employers involved in those cases, but any other employer as well.[1]

The contempt judgment, *inter alia*, requires petitioners to cease giving effect to two collective bargaining agreements which were obtained through unlawful employer assistance and to reimburse the employees for monies exacted from them under those contracts. The judgment also requires that notices of the adjudication be posted at petitioner Union's "business offices, meeting halls, and all places where notices to employees are customarily posted." Finally, the judgment provides that each future violation of the decrees shall subject petitioner Union to a compliance fine of $10,000, and a further fine of $1,000 for each day the violation continues; similarly, petitioners Tolkow and Stirt are each subject to a compliance fine of $2,000, and a further fine of $200 for each day the violation continues. (Pet. App. 2a-5a.)[2]

2. The petition raises issues concerning the validity

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[1] *National Labor Relations Board* v. *Salmirs Oil Co. and Amalgamated Local Union 355*, No. 28, 451, enforcing 139 NLRB 25; *National Labor Relations Board* v. *Richmond Rambler Sales, Inc. and Amalgamated Local Union 355*, No. 30,236-7, enforcing an order of the Board dated December 14, 1965; *National Labor Relations Board* v. *Command Lincoln-Mercury Corp. and Amalgamated Local Union 355*, No. 30,405-6, enforcing an order of the Board dated March 7, 1966. In all of these cases, petitioner Union had insisted upon the status of exclusive bargaining representative even though it did not represent an uncoerced majority of the employees involved.

[2] On August 21, 1971, Mr. Justice Harlan denied petitioners' request for a stay of the contempt judgment pending the filing and disposition of the present petition for a writ of certiorari.

of the underlying decrees which do not warrant review by this Court.

(a) Petitioners contend (Pet. 7) that the underlying decrees, since they incorporate by reference the Board's orders, violate Rule 65(d) of the Federal Rules of Civil Procedure. It is the practice of all the courts of appeals, except the Ninth Circuit, to incorporate the Board's order by reference, where, as here, it is enforced without modification.[3] "The validity of such a technique has been recognized at least since *N.L.R.B.* v. *Hopwood Retinning Co.*, 104 F. 2d 302 (2nd Cir., 1939)." *National Labor Relations Board* v. *International Shoe Corp. of Puerto Rico*, 423 F.2d 503, 505 (C.A. 1). Moreover, the practice of incorporating by reference Board orders is fully consistent with the "notice concept" of Rule 65(d). For, unlike a district court judgment which adjudicates rights and duties based on the court's own findings, enforcement decrees merely put the judicial imprimatur on the order of the Board, which, in turn, informs the respondent of the exact duties imposed upon him.[4]

(b) Petitioners' attack on the breadth of the decrees (Pet. 8) comes too late, for they have long since

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[3] Contrary to petitioners' assertion (Pet. 7), the practice of the Ninth Circuit does not create a conflict among the circuits warranting resolution by this Court. The Ninth Circuit has never indicated that the practice in the other circuits is invalid, but has merely elected to adopt a different procedure.

[4] *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9, relied upon by petitioners (Pet. 7), is inapposite. The issue there was whether the term "successors and assigns" in an enforcement order could enlarge its scope beyond that provided in Rule 65(d). The Board here has never maintained that the prescriptions contained in its orders were broader than those in Rule 65(d).

become final. In any case, they were all adequately supported when entered. The first decree was fashioned upon an unchallenged finding that "Local 355 [had] engaged in similar improper activities with respect to the employees of employers other than the Company [there] involved." 139 NLRB at 26.[5] It is settled that the Board may enjoin similar and related acts against the employees of employers other than those immediately involved, where such acts may be anticipated from the wrongdoer's past misconduct. *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 437; *Communications Workers* v. *National Labor Relations Board*, 362 U.S. 479, 480-481; *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 705-706. Moreover, the second and third decrees were consented to. See *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318. Contrary to petitioners' assertion (Pet. 8) that imposition of "[t]he three decrees puts the Union forever in a different class from other unions," the Union's demonstrated proclivity for violating the National Labor Relations

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[5] At that time there were already two Board orders based on petitioner Union's unlawful "sweetheart" activity: *Lundy Mfg. Corp.*, 136 NLRB 1230, enforced, 316 F. 2d 921 (C.A. 2), certiorari denied, 375 U.S. 895; *Fiore Bros. Oil Co.* 137 NLRB 191, enforced, 317 F. 2d 710 (C.A. 2). Presently there are eight outstanding Board orders involving the Union. In addition to the foregoing two orders and the three involved in this proceeding, see *Malcolm Konner Chevrolet, Inc.*, 141 NLRB 541, enforced, 338 F. 2d 972 (C.A. 3); *Raymond Buick, Inc.*, 173 NLRB No. 199, enforced No. 35,426, June 24, 1971 (C.A. 2); *Buckingham Livery Service, Inc.*, Board Case No. 29-CA-916, order dated February 18, 1969 (unreported).

Act justified the broad orders entered against it and its agents.

(c) Petitioners contend (Pet. 8-9) that, by proceeding on new unfair labor practice charges rather than by way of contempt after the first decree was entered, the Board thereby construed that decree to apply only to the employers there named. The short answer to this contention is that, although new violations may be covered by an outstanding decree, the Board, for a variety of reasons, may institute a new unfair labor practice instead of a contempt proceeding. See *National Labor Relations Board* v. *Swift Co.*, 302 F. 2d 342 (C.A. 7); *Thompson Products* v. *National Labor Relations Board*, 133 F. 2d 637 (C.A. 6); cf. *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 106. Accordingly, the fact that the Board originally followed that course here does not establish that the outstanding decrees were narrow in scope.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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General Counsel,
National Labor Relations Board.

NOVEMBER 1971

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